

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9598 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

GOVIND CHHABABHAI PATEL

Versus

DY COMMISSIONER OF INCOME TAX

Appearance:

MR SN SOPARKAR for Petitioner

MR BB NAYAK FOR MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE M.C.PATEL

Date of decision: 13/07/1999

ORAL JUDGEMENT (Per B.C. Patel, J.)

The petitioner has approached this Court by invoking Article 226 of the Constitution of India challenging notice dated 28.8.1995, Annexure 'A', issued by the respondent under section 148 of the Income Tax Act, 1961 [hereinafter referred to as the Act].

2. Short facts as it emerges from the record are as under:-

2.1 The petitioner filed his Return of Income for Assessment Year 1985-86 declaring total income at Rs.5,000/-. Lateron, a revised Return was filed showing loss of Rs.1,01,023/-. After scrutiny of the petitioner's case under section 143 (3) of the Act, an Assessment Order, Annexure 'B', came to be passed, which was challenged by preferring appeal before the Commissioner of Income Tax (Appeals), which was pending at the relevant time.

2.2 On or about 17.12.1990, the Assessing Officer, vide Annexure 'C', called upon the petitioner to furnish certain information which was sent by the petitioner on 6.3.1991. The petitioner, in the Return indicated long term capital loss of Rs.2,25,575/-. The cost of silver articles was indicated in the return as Rs.5,05,027/-. According to the petitioner, the silver was sold at Rs.2,79,452/-, and therefore, the petitioner claimed loss of Rs.2,25,575/-.

3. Mr. Soparkar submitted that the Assessment Order for the A.Y. 1985-86, Annexure 'B', was passed by the Assessing Officer on 28.3.1988. It is clear that the said order is passed under section 143 (3) of the Act and the income of the petitioner was assessed at Rs.1,61,020/- after considering the long term capital gain and long term capital loss on the sale of silver.

4. Mr. Soparkar further submitted that there was no justification for issuance of notice under section 148 of the Act, Annexure 'A'. He further submitted that the order for the A.Y. 1985-86 was passed on 28.3.1988 and the same could not have been re-opened by the respondent in view of the provisions contained in section 147 of the Act. He further submitted that notice is patently without jurisdiction being grossly time barred. In view of proviso to section 147 of the Act, where an assessment under section 143 (3) of the Act has been made for an assessment year, no action could be taken under section 147 of the Act after expiry of four years from the end of the Assessment Year unless (i). there is failure on the part of the assessee to make a return under Section 139 of the Act; (ii). There is failure on the part of the assessee to make a return in response to the notice issued under sub-section (1) of section 142 or 148 of the Act, and, (iii). there is failure on the part of the assessee to disclose fully and truly all the material

facts necessary for his assessment for that assessment year.

5. Mr. Soparkar submitted that it is not the case of the Department that the petitioner has suppressed any material fact which would suggest that the petitioner failed to disclose fully and truly all the material facts necessary for his assessment for that assessment year. In view of the aforesaid submissions, Mr. Soparkar submitted that the Court should quash the notice at Annexure 'A'.

6. Mr. B.B. Nayak, learned counsel submitted that in the instant case, the price of silver which was shown by the petitioner in the Return was not correctly shown, and in his submission, the amount of interest taken by way of loan by the petitioner for purchase of silver could not have been included in the price of silver or the cost of silver. According to him, the petitioner has wrongly claimed the amount of interest towards the cost of the purchase of silver.

7. The assessing officer has computed the income of the assessee in the Assessment Order considering long term capital loss on the sale of silver. In paragraph 4 of the order, there is a reference to long term capital loss of Rs.2,99,800/- on sale of 80.015 kgs. As the loss was not correctly worked out by the assessee, the assessee therefore filed a revised working showing capital loss of Rs.2,25,575/- on the sale of silver.

8. On behalf of the Income Tax Department, an affidavit in reply is filed along with which the reasons for the belief that income has escaped assessment is annexed. Reading paragraph 2 of the said reasons, the instant case is a clear case of change of opinion. It is specifically mentioned that "this is a business investment and claim of the capitalisation of interest in computation of capital gain is incorrectly allowed. This has resulted into under assessment by Rs.1,60,010/- under the head "capital gain" and subsequently, income from house property is also under assessed by Rs.13,333/-." From that paragraph, it also appears that the silver was purchased at Rs.3,45,011/and the silver was sold at Rs.2,79,452/- which has resulted into the loss of Rs.65,559/-, and, this is due to the fact that the original cost price of this silver has been increased by the amount of capitalised interest of Rs.1,60,016/- on borrowed funds to be utilised for the business purpose. Thus, it is clear that the material was before the Assessing Officer. Thus, it is the Department's case

that claim of the capitalisation of interest in computation of capital gain is incorrectly allowed. There is no material placed on the record to show that the petitioner has suppressed any material fact or has failed to disclose fully and truly all material facts necessary for his assessment. The fact that material facts were furnished indicate that the assessee has not suppressed any material fact. From the reasons placed on record, it clearly appears that the Assessing officer has considered the amount of interest in computation of capital loss, but the succeeding officer has arrived at a conclusion that claim of capitalisation of interest in computing capital loss has been incorrectly allowed. Thus, it cannot be said that the petitioner has suppressed any material facts. Petitioner placed all necessary material and it was for the Assessing Officer to consider that material. Earlier Assessing Officer considered the capitalisation of the amount of interest in computing capital loss. Now, on the same material, succeeding Assessing Officer wants to take a different view. The view taken by the subsequent officer is nothing but a change of opinion.

9. For the reasons recorded above, this petition is required to be allowed and is allowed. Notice at Annexure 'A' to the petition for reopening the assessment for the year 1985-86 is hereby quashed and set aside. Rule made absolute accordingly. No order as to costs.
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